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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 20

MILK WAGON DRIVERS' UNION, LOCAL NO. 753, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, A VOLUNTARY ASSOCIATION; ROBERT G. FITCHIE, JAMES KENNEDY, STEVE SUMNER, FRED C. DAHMS, F. RAY BRYANT, ALVIN F. RICHARDS and JOSEPH L. PATTERSON,

Petitioners,

vs.

LAKE VALLEY FARM PRODUCTS, INC., a corporation; AMALGAMATED DAIRY WORKERS, LOCAL INDUSTRIAL UNION NO. 819, A VOLUNTARY UNINCORPORATED ASSOCIATION; LAKE VIEW CO-OPERATIVE OF WATERTOWN, WISCONSIN, AN AGRICULTURAL COOPERATIVE CORPORATION OF THE STATE OF WISCONSIN,

Respondents.

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI AND BRIEF THEREWITH.

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Respondents.

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI AND BRIEF THEREWITH.

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petition for certiorari was filed by petitioners herein on February 28, 1940. Respondents filed an Answer. On April 1, 1940, this Court granted certiorari.

In following the nomenclature of our petition and respondents' answer, we shall refer to petitioners as the defendants, and to the respondents as the plaintiffs—as the parties were entitled in the trial court.

Defendants adopt and rely on the petition for certiorari. Defendants are filing *this* brief mainly in reply to and in refutation of arguments and authorities advanced in plaintiffs' answer. Plaintiffs' answer does not follow the outline of our original petition. For the purposes of clearness in this brief, we shall follow the outline of plaintiffs' answer.

Preliminary.

Avoiding Previous Judicial Mistakes.

As shown in our petition (p. 17), the problems for determination presented by this case are of tremendous significance to our national social structure. The solution of these problems is achieved only by jurisprudential statesmanship. But the technique and the reasoning adopted by plaintiffs' answer illustrates to a striking degree the manner in which similarly broad jurisprudential problems have been presented to and disposed of by courts that failed to recognize that *personal* social and economic beliefs or opinions are not adequate or sufficient to solve national economic and social problems.

This technique previously employed by courts has failed to solve problems of economic competition, *i.e.* industrial conflict between employers and employees. Such failure has been graphically demonstrated in and by the following authorities:

Frankfurter & Greene: The Labor Injunction Chap. 1, esp. at pp. 3, 5-17, 24-46, and authorities there cited.

Magruder: "A Half Century of Legal Influence

upon the Development of Collective Bargaining," 50 Harv. L. Rev. 1071 (1937), esp. at pp. 1071, 1078-1086, and authorities there cited.

Hellerstein: "Secondary Boycotts in Labor Disputes," 47 Yale L. J. 340.

The tortuous history of labor cases in courts of Illinois is described in:

Beckner, "A History of Illinois Labor Legislation" (1929).

This judicial error was most vividly demonstrated in decisions by Federal courts involving "Labor and the Sherman Act."

Frankfurter & Greene: Opus cited, at p. 7-11.

Berman: "Labor and the Sherman Act" (1930).

Terbogh: "The Application of the Sherman Act to Trade Union Activities," 37 J. Pol. Economy 203 (1929).

Quigg: "Trade Union Activities and the Sherman Act," 147 Annals 51 (Jan., 1930).

"Labor and the Sherman Act," 49 Yale L. J. 518, at 522.

The broad problems of jurisprudence presented in our original petition involve:

1. A recognition of the Federal Legislative establishment of our national public policy by the Norris-La Guardia Act which was enacted to obviate the judicial construction of Sections 6 and 20 of the Clayton Act of 1914 by the Federal Courts.

2. An understanding of the complex problems of industrial conflict between employers and employees.

3. An adjustment of the delicate balance between federal and state power in the administration of the Anti-Trust laws of the United States.

On these problems:

Plaintiffs would have this Court construe the Norris-La Guardia Act so that the situation should be the same

as if the Norris-La Guardia Act had merely re-enacted Sections 6 and 20 of the Clayton Act.

Plaintiffs would have this Court construe "legitimate" activity of labor unions and its members in such a way as to return the federal courts into the business of "governing" economic competition by means of injunctions.

Finally, plaintiffs would have this Court construe the federal Anti-Trust laws so that, for all practical purposes, the line of distinction between federal and state power would be abolished by the means of having federal courts follow the state law in determining whether unions have violated Anti-Trust laws.

This unsound technique and faulty reasoning runs throughout each of the three sections of plaintiffs' answer.

FACTS.

Plaintiffs criticize our summary statement of the matter involved.

It must be remembered that both the Master (esp. at R. 220-221) and the District Court found the fact in favor of the defendants and against the plaintiffs. The trial court's decree specifically stated that the equities were with the defendants (R. 250), and dismissed the complaint for want of equity (R. 252).

The opinion of the majority of the Circuit Court of Appeals seemed to treat the Master's finding of facts as immaterial to the issues of law passed upon by the District Court. This was erroneous.

At the very least, it is undisputed that the Circuit Court of Appeals did not reverse the Master's findings on the

ground that it was contrary to the manifest weight of the evidence.

Under Rule 53, e, 2, of Rules of Civil Procedure, the Master's findings of fact are accepted as correct unless clearly erroneous. This is probably the same as former equity rule 61½. This includes the "inferences" drawn by the Master therefrom.

Plaintiffs contend that the "motive" for defendant's conduct was to "fix the price of milk" or to "prevent the sale of cut-rate milk." But the Master and the District Court found squarely against plaintiffs on this issue of fact.

In addition, plaintiffs err in confusing "motive" with "economic result". Defendant's purpose or object is unionization of non-union dairies.

cf. Sect. 777, Restatement on Law of Torts, 4 Torts A. L. I. p. 163.

Facts Overlooked by Plaintiff.

The plaintiff dairy obtains milk wagon driver delivery service from its vendors and their helpers at a "wage return" lower than union scale (R. 290, 300, 315). The vendors and their helpers work under conditions that are less favorable than union working conditions, as to hours, vacations, workmen's compensation protection, seniority, etc. (R. 312, 337-338).

There is no substantial difference between vendors or regular drivers insofar as the services performed (R. 303, 311).

The picketing of the retail stores vending plaintiff dairy's milk products was for the purpose or object of unionizing non-union dairies (R. 280, 350), including the plaintiff dairy.

Wagner Dairy, one of the original plaintiffs in the trial court, was requested to and refused to sign a union contract with the defendant union.

Lake Valley Dairy, also known as Lake View Dairy, had not only been approached by defendant union to sign a union contract but had actually commenced to unionize and then had changed its mind and refunded dues collected from its employees (R. 281-282, 284, 288, 306, 320, 332).

The defendant union attempted to by peacefully persuade retail storekeepers to handle and sell *union milk* and not to sell plaintiff dairy's *non-union* milk.

The storekeepers in many instances chose to sell plaintiff dairy's non-union milk regardless of the effect upon the wage scale and working conditions of the members of defendant union (R. 327, 330).

Picketing stores was "directed" against the non-union quality of plaintiff dairy's milk and not at its price (R. 287, 328, 333, 336, 337-338, 339, 350).

One hundred nineteen out of one hundred twenty *union* dairies in Chicago sold some "cut-rate milk" (R. 282, 317-318, 344).

Plaintiff dairy's milk was sold at varying prices in retail stores with prices ranging just as high as the highest prices charged by union dairies (R. 331).

The plaintiff C. I. O. Union was in open economic competition with the defendant A. F. of L. Union on the issue of unionization of plaintiff dairy workers. The retail storekeepers were given C. I. O. Union cards, were told that the *drivers* were unionized, and were told to place such union cards in the window (R. 60, 277, 278, 279, 284, 299).

The sign was put in by the C. I. O. Union to put the defendant union out of business (R. 288, 329, 330).

Milk prices were not inevitably correlated with union wages for in at least two instances milk prices of union milk were decreased though union wages were increased (R. 343). There was no price agreement between the union dairies and the union (R. 347).

Picketing of a retail store did *not* in *all* cases result in a reduction of the amount of milk sold (R. 281, 330).

There was no showing by plaintiffs of the reduction in amount of milk shipped in interstate commerce from Wisconsin (R. 303).

The decisions in other cases arising out of attempts by defendant union to unionize other Chicago non-union dairies reflect similar facts. See:

Meadowmoor Dairies v. *Milk Wagon Driver's Union*, 371 Ill. 377, pending on certiorari in this court, No. 1, Oct. Term. 1940.

Maywood Farms v. *Milk Wagon Driver's Union* (Appell. Ct. Ill., 1st District C. C. H. Labor Law Service (2nd Ed.), ¶18, 453).

1 Labor Cases 1311 (Oct. 30, 1939).

Ellingsen v. *Milk Wagon Drivers' Union* (Ill. Supreme Court, April 10, 1940; now pending on petition for rehearing).

C. C. H. Labor Law Service (2nd ed.), ¶ 18, 613.

ARGUMENT.

Replying to Plaintiffs' I.

Alleged Illegality of Union Purpose.

Plaintiffs' entire argument about "illegality" under this heading is unsound because it fails to recognize that the *only* alleged basis of federal *jurisdiction* was a violation of the Sherman Anti-Trust Act.

Plaintiffs' complaint is substantially based on this theory. The Circuit Court of Appeals reversed on this theory (R. 366, 367). Consequently, the only kind of illegality upon which plaintiffs may rely is an alleged violation by the defendants of the Federal Anti-Trust laws. This true both as to alleged illegality of purpose *or* means.

This is not a case where jurisdiction of the federal court may be based on diversity of citizenship. Accordingly, the substantive law of Illinois as to the "legality or the illegality" of the defendants' conduct is not involved in the case at bar.

Plaintiffs seek an injunction on the alleged ground that the defendants violated the Federal Anti-Trust laws. Their claim for injunction is based upon Section 16 of the Clayton Act (Oct. 15, 1914, C. 323, Sect. 16, 38 Stat. 737, 15 U. S. C. A., Sect. 26). This statute for the first time granting injunction to a private suitor was passed at the same time as Sections 6 and 20 of the Clayton Act giving certain immunities to labor unions and their activities (Clayton Act, Sect. 6, Act of Oct. 15, 1914, C. 323, Sect. 6,

38 Stat. 731; 15 U. S. C. A. 17; Clayton Act, Sect. 20, Act of Oct. 15, 1914, C. 323, Sect. 20, 38 Stat. 738. 29 U. S. C. A. Sect. 52). The construction of Sect. 16 should not render nugatory the provisions of Sects. 6 and 20. (cf. Powell: 13 Academy of Pol. Sci. Proc. 54 (1928.)) (See our petition, appendix 7-8.)

This suit is not like a suit at law for money damages as in the case of *Apex Hosiery* v. *Leader*, where the suit is under Section 7 of the Sherman Act (July 2, 1890, C. 647, Sect. 7, 27 Stat. 210, 15 U. S. C. A. Sect. 15, and note Act of Aug. 27, 1894, Chap. 349, Sect. 77, 28 Stat. 570, repassed on Oct. 15, 1914, Chap. 323, Sect. 4, 38 Stat. 731).

This is not a case where the jurisdiction of the federal court was based upon both diversity of citizenship and alleged violation of the anti-trust laws. In those cases the general equity powers of the Federal Court could be availed of by the plaintiff.

To accept plaintiffs' conception of "illegality" under I of this heading would mean that the Norris-La Guardia Act and all other federal legislation based upon the premise that unionization of workingmen is to be encouraged would be defeated by a judicial process of construction of legislation. By such a construction courts would disregard the legislative will, and would substitute in its stead their own personal social and economic convictions.

For example, assuming that plaintiffs' statement at page 17 to the effect that there is no labor dispute (*i.e.*, the Norris-La Guardia Act does not apply) because there existed a conspiracy to prevent the sale of cut-rate milk and to control distribution of milk in Chicago, which may be assumed for the sake of argument to be illegal as constituting a tort by the substantive law of the state, even then the question of whether or not a federal court

will issue an injunction depends upon whether the facts indicate the existence of the kind of restraint condemned by the anti-trust laws, that is to say, a violation of the Sherman Act not immunized by the Clayton Act.

Plaintiffs' entire argument proceeds under the basic fallacy that in determining whether the object is legal or illegal a Court must look at the union objects and methods and measure the illegality by the substantive law of the state. This is error. We contend that prior to determining whether the conduct was legal or illegal we first must see whether the federal district court had jurisdiction. In this case the jurisdiction depended upon federal rights under the anti-trust laws. If there was no violation of the anti-trust laws there was no ground for jurisdiction. Hence the only illegality that can be considered is the violation of the anti-trust laws. Only after that determination can the "merits" be considered.

Distinction between "jurisdiction" and "merits" must be carefully kept in mind (49 Yale L. J. at 522-523, N. 31-32).

Plaintiffs' attempted distinction of our cases under the Norris-La Guardia Act on the ground that they refer only to legal objectives and legal means is therefore unsound because they are not limiting themselves to problems under the Anti-Trust Act.

There is another error inherent in plaintiffs' argument. Our cases were cited to show the definition of a labor dispute. Plaintiffs' error lies in assuming that the absence of a labor dispute is identical to the existence of a violation of the Sherman Act. In other words, they are arguing if there exists a conspiracy to commit an unlawful object or to attain a lawful object by unlawful means, then there is no labor dispute within the meaning of the Norris-La Guardia Act. That is the wrong ap-

proach. We say that even assuming the existence of an unlawful purpose, or the existence of unlawful means to accomplish a lawful purpose, according to the substantive law of the state, there still are two separate problems:

First, does the defendants' conduct violate the provisions of the Sherman Act? (Here the factual economic and social conditions are important and must be given full sway. *Appalachian Coals* v. *U. S.*, 288 U. S. 344, 361, 374.)

Second, even assuming the existence of a violation of the Sherman Act, under the terms of the Norris-La Guardia Act, may a federal court issue any injunction or any particular injunction restraining the union activity in question?

The Norris-La Guardia Act limits the jurisdiction of the federal courts in issuing injunctions in industrial disputes as follows: Where there is a labor dispute within the meaning of the Act, there can be no injunction against the acts described in Section 4, regardless of legality or illegality. Second, assuming a labor dispute exists, an injunction can be granted against only certain kinds of illegal acts, *i.e.*, fraud or violence. Third, assuming a labor dispute exists, Section 5 of the Norris-La Guardia Act makes it clear that any acts that may be illegal by virtue of a conspiracy in violation of the Anti-Trust Acts can *not* be enjoined in an industrial combat provided the acts fall within the specific enumeration and description of Section 4.

The authorities cited by this court in *Apex Hosiery* v. *Leader*, 84 Law Ed. 913 (especially authorities cited in the footnotes) will not be repeated in this brief. However, petitioners strongly rely on them.

At page 16 plaintiffs state, citing decisions, that if the object is not one of legitimate union concern, relief against "all means used" may be had by injunction.

This is unsound. First, all cases cited by plaintiffs with the exception of *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers Union,* 371 Ill. 377, were decided *prior* to the passage of the Norris-La Guardia Act. The last case cited is now pending on the docket of this Court as No. 1, October Term, 1940 (certiorari allowed June 3, 1940).

A brief discussion of these decisions will be helpful in corroborating our contention that the purposes of the Norris-La Guardia Act and similar legislation should not be defeated by judicial misconstruction.

In the *Duplex Press* case, the facts were that although the object of the union was lawful in New York and the means used were lawful in New York, the majority of this Court held that nevertheless the union activities were enjoinable as a violation of the Federal Anti-Trust Laws. The Norris-La Guardia Act was passed as a result of this and similar decisions. Jurisdiction of the federal court was invoked on theories of both diversity of citizenship and violation of the Sherman Anti-Trust Law (254 U. S. at 461). The conduct complained of occurred *before* Section 20 of the Clayton Act was passed. Insofar as the section purported to legalize these acts the language is therefore *dicta.* At page 466 this Court recognized that it was immaterial under the anti-trust laws whether the activities (*i.e.,* the "boycott"), was lawful or unlawful under the common law of the state or under the state statutes since the question presented was under a federal statute. At page 467, this Court stated that restraint by peaceable persuasion is within the prohibition of the Sherman Act as well as restraint by force, and that there was no justification on the ground that the object was beneficial to the actors. Compare this reasoning

with the "rule of reason" cases under the Sherman Act. This is squarely in conflict with this rule and especially with the language in the *Appalachian* case. This conflicts with the language and reasoning in *Apex Hosiery* v. *Leader*. At page 469, this Court says the question is "what are the normal and legitimate objects of the union." Such objects may have been "unacceptable or illegal" in 1920 but may be "acceptable and legal" in 1940. At page 470, this Court states that the legalizing words of Section 20 of the Clayton Act refer only to the parties to the dispute, *i.e.*, the employer and *his* employees. The enactment of the Norris-La Guardia Act is legislative recognition that parties to an industrial dispute include more than the "immediate" employer-employee participants. At page 471 this Court, in discussing special privileges or immunities to a particular group, is apparently concerned with the employer's argument (shown at page 452) that to give the words of Section 20 their apparent literal significance would raise a serious question concerning their constitutionality on the ground that such special privileges would render the statute void under the rule of *Connelly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. This possible fear has been eradicated by the decision of this Court in *Tigner* v. *Texas*, decided 1940.

At page 472, this Court reaches the nub in the case when it contrasts "proximate and substantial interests" of the union with its "fundamental or sympathetic interests" in the dispute.

The majority failed to recognize that the interest of the Pressmen's union in New York in the working conditions in the Michigan plant was proximate and substantial. Today, would it be doubted that the New York pressmen were proximately and substantially interested in the working conditions of their fellow union members

in the factory in Battle Creek, Michigan? If the majority had accepted such economic and social axiom, it would have agreed with the conclusion dictated by the force of reason in the dissenting opinion of Justice Brandeis. Justice Brandeis recognized that the problem before the Court involved the same judicial process as that leading up to the decision of Chief Justice Shaw in *Commonwealth* v. *Hunt,* decided in 1842—"a better realization of the facts of industrial life." This court relied upon the facts of industrial life in *Appalachian Coals* v. *U. S.,* 288 U. S. at 361, 372-377.

It is not so long ago that this Court invalidated the laws passed for the physical health and safety of employees on the ground that such laws interfered with the freedom of the individual to contract. (*Lochner* v. *New York,* 198 U. S. 45 (1905).) Mr. Justice Holmes in his dissenting opinion in the *Lochner* case vividly demonstrated the fallacies inherent in the Court's invalidation of such legislation (pp. 75-76).

Perhaps, as a result of this cogent dissent, this Court in conformance with modern social and economic conditions upheld the New York employers' liability law when the case came before it for the *second* time. Recognition of the necessity of legislation for the safety and welfare of workers as well as reimbursement for their physical injury was slowly but inevitably accepted by the courts of the land.

Similarly, when complex issues in economic competition came to the Court, as they did in such labor cases as the *Duplex Press* case, the majority was slow to recognize the economic realities that caused the New York members of the pressmen's union to consider the working conditions in the Battle Creek factory as having a direct and substantial injurious effect upon their eco-

nomic welfare. Due to judicial delay in recognizing and acting on the basis of economic realities, the federal legislature gave legislative recognition, approval and acceptance to these economic realities. This was done by not only recognizing the desirability of organization of working men, but also the encouragement of vital and real functioning of such organization. The prophetic utterances of Justice Brandeis in his dissenting opinion in the *Duplex* case with regard to the purposes of the Clayton Act (which were defeated by the majority opinion in the *Duplex Press* case) supplies emphatic clarity and realistic authority to our contention that the Norris-La Guardia Act was passed as a result of, in part at least, as a result of the fact that, "* * * The chief source of dissension with the existing law lay in the doctrine of malicious combination (citing cases) and in many parts of the country in the judicial declaration of the illegality at common law of picketing and persuading others to leave work." (at page 484.)

In a footnote Justice Brandeis calls attention to the report of the Committee on Industrial Relations of 1915, at page 136, to the effect that it would be desirable to remove all restrictions upon parties to industrial competition thus legalizing the strike, the lockout, the boycott, the black list, the bringing in of strike breakers and peaceful picketing.

The Federal Congress has acted on recommendations made in this report, accepting certain of these recommendations and rejecting others. See Statutes cited *Apex Hosiery* v. *Leader*, 84 Law Ed. at 921 (n. 14), 928 (n. 23-24.) Insofar as the situation in the *Duplex Press* case is concerned, can it be doubted that under similar situation today a federal court would not have jurisdiction to enter an injunction restraining the activities of the pressmen's union?

Consider the *Gompers* v. *Buck Stove Co.*, 221 U. S. 418. This case has been misunderstood, and has been the source of considerable error. First, the language from the opinion concerning boycott, etc., is purely, *dicta*. The case involved an appeal from a judgment of the Court of Appeals for the District of Columbia affirming a trial court order adjudging the defendants in contempt of court for violating a preliminary injunction granted by the trial court. The decision of the Court of Appeals on the merits in affirming the temporary injunction as modified is reported in 33 App. D. C. 83, with a vigorous and able dissenting opinion of Chief Justice Shepard, beginning at page 126. This ruling of affirmance on the merits was appealed to this Court, but the appeal was dismissed as moot in 219 U. S. 581. Accordingly, the dismissal of the appeal on the merits on the ground that the proceedings were moot in that the matter had been settled caused this Court to hold in 221 U. S. 418 that the contempt proceedings, being civil in their nature, were auxiliary to the civil proceedings on the merits, and since the civil proceedings on the merits had become moot it was unnecessary to render a decision on the civil contempt proceedings. Accordingly the cause was reversed and remanded with directions to the trial court to institute criminal contempt proceedings if it so saw fit.

(As a matter of history the trial court did proceed against *Gompers* for criminal contempt, and found him guilty of such criminal contempt. Such conviction for criminal contempt was reversed in 233 U. S. 604 in this Court, opinion by Mr. Justice Holmes, on the ground that the Statute of Limitations barred the contempt proceedings.)

The *dicta* of the majority of this Court must be measured against the dissenting opinion of Mr. Chief Jus-

tice Shepard of the Court of Appeals with regard to the power of a court of equity to restrain the publication of an "unfair list" on the ground that freedom of speech under the first amendment prevented a federal equity court from restraining publication (33 App. D. C., especially at page 129, and 132), and also his dissent on the same ground in the affirmance by the majority of the conviction for contempt (33 App. D. C. at p. 584).

The case of *Eastern States Retail Lumber Dealers Assoc.* v. *United States,* 234 U. S. 600, was a suit by the United States. The facts showed that the restraint could not be said to be within the rule of reason.

Loewe v. *Lawlor,* 235 U. S. 522, was a suit at law for damages for violation of the Anti-Trust laws.

In *American Steel Foundries* v. *Tri City Trades Council,* 257 U. S. 184, the jurisdiction of the trial court was based upon diversity of citizenship (at p. 189, 193 and 200). The trial court enjoined all picketing. The Circuit Court of Appeals for the Seventh Circuit, in an opinion by Justice Evans, permitted all picketing provided it was not done "in threatening or intimidating manner." This cause was argued three times before this Court, was on its docket for almost three years. During this time the Duplex Press case was decided. The decision in substance was to the effect that the Circuit Court of Appeals had erred in inserting the phrase "in threatening or intimidating manner" because such qualification was not clear or specific enough; second, the Court approved of the ruling of the Circuit Court of Appeals in striking out the word "persuasion" from the injunction granted by the trial court; third, it was held that on the facts of the particular case one picket for each entrance or exit would be permitted—that the Court wanted to avoid the unlawful conduct of physical violence or intimidation. The Court

stated that there was no general rule that could be applied to all cases except to avoid "inevitable intimidation of the presence of groups of pickets but to allow missionaries." It cannot be doubted that there was considerable violence (see 257 U. S. at 188).

But even this construction broadened Section 20 of the Clayton Act over the construction given by this Court in the *Duplex Press* case.

In *Scavenger Service Corp.* v. *Courtney,* 85 Fed. (2d) 825, the facts were that certain employers were using the union to prevent the plaintiff from entering into the scavenger business in Chicago. Plaintiff paid union scale, was willing to hire members of the defendant union, and was willing to have his men join the defendant union. In addition, jurisdiction was based upon diversity of citizenship.

Alleged Illegal Means.

The Master and the trial court held that the legal means, *i.e.,* peaceful picketing, were separable from the illegal means, *i.e.,* violence. The Circuit Court of Appeals did not expressly or impliedly hold that the violence was inseparable from the peaceful picketing. The Master's report indicates that upon the issue of fact whether violence insofar as committed by the members of the defendant union, the *only* findings he made in favor of the plaintiffs in this issue were that in several instances windows were smashed after pickets had been withdrawn and the Master concluded that either the union *or* its members had done this admittedly wrongful act.

The defendants neither here or in the court below sought to or now seek to condone the commission of acts of violence. Violence is ethically, legally and morally wrongful. Defendants denied and continue to deny that

the violence had been accomplished by the union or its officials or any of its authorized representatives. In substance the triers of fact so found. The Master and the District Court found that the violence that was committed by the "union or its members" could be separated from the peaceful picketing. Such a finding even according to plaintiffs' contention does not warrant the restraint of the legal means—peaceful picketing. Decisions to that effect are:

American Steel Foundries v. *Tri City Trades Council,* 257 U. S. 184.

Fenske Bros. v. *Upholsterers Union,* 358 Ill. 239 at 260.

Wise Shoe Co. v. *Lowenthal,* 266 N. Y. 264, 194 N. E. 749, at 750.

Iron Molders Union v. *Allis Chalmers Co.,* 166 Fed. 45, at 51.

Restatement of the Law of Torts, Sects. 815-816.

Baillis v. *Fuchs,* 283 N. Y. 133, 27 N. E. (2d) 812, at 814.

May's Furs v. *Bauer,* 282 N. Y. 331, 26 N. E. (2d) 279, at 284.

Warner Co. v. *Lilly Co.,* 265 U. S. 526, at 532.

Plaintiffs' attempts to distinguish cases we cited under the Norris-La Guardia Act are not sound.

In *Lauf* v. *Schinner Co.,* the evidence showed such unlawful acts as force and misleading signs, false accusations, molestations, threats, annoyance, intimidations, all of which prevented patrons from patronizing the employer's stores. Jurisdiction was there based upon diversity of citizenship.

In *Blankenship* v. *Kurfman,* the alleged jurisdictional grounds were the rights of the plaintiff union under the

National Labor Relations Board Act, and rights and duties affecting a free flow of interstate commerce. There, too, there were acts of violence and threats of violence (452).

In *Grace & Co.* v. *Williams,* alleged ground of jurisdiction was interference by defendants with free flow of interstate commerce. There were acts of violence, threats, assaults, etc.

The Congressional debates on the Norris-La Guardia Act indicate that "intimidation and coercion" were *rejected* as constituting a basis for the issuance of injunctions.

75 Cong. Rec. 4678 (Senator Wheeler).

In *Levering & Co.* v. *Morrin,* the history of the suit is significant. In the original suit the trial court's decree for an injunction was reversed by the Circuit Court of Appeals for the Second Circuit in 61 F. (2) 115. This ruling was affirmed by this Court in 289 U. S. 103 on the ground there was no jurisdiction under the Sherman Act where sympathetic strikes, boycotts, etc., by defendant union in New York City prevented the use of steel in New York City as a result of defendant's plan or conspiracy to compel the employment of union labor only; the "object" was an exclusive local aim. Therefore, it was outside the realm of the Anti-Trust law. Consequently, the defendants amended their complaint to rely on diversity of citizenship as basis of federal jurisdiction. This subsequent suit after the passage of the Norris-La Guardia Act in 1932. The Circuit Court of Appeals held there was a labor dispute within the meaning of the Norris-La-Guardia Act.

II.

Replying to Plaintiffs' II.

SHERMAN ACT NOT INTENDED TO PREVENT UNIONIZATION OF NON-UNION DAIRIES.

Plaintiffs' argument with regard to facts and findings as to interstate commerce and interference with sale of milk in Chicago as a violation of the Anti-Trust laws of the United States must be considered in the light of the recent decision in *Apex Hosiery Co.* v. *Leader,* 84 Law. Ed. 913, decided May 27, 1940.

We contend that: First, under the principle of *stare decisis,* the facts in the *Apex* case, as a matter of the *ratio decidendi,* compel a decision in favor of the defendant union in the case at bar. Second, that the reasoning in the court's opinion corroborates our analysis in our brief (pages 38-41). Third, that the language of the opinion supports our analysis and reasoning in the instant case. We also say, that even under the reasoning of the minority, in the opinion by Chief Justice Hughes, the result in our case should be the same as under the decision and reasoning of the majority of this Court.

First, the majority of this Court held that a plan to physically stop and prevent the shipment of manufactured goods from a factory into foreign states was not a violation of the Sherman Act where the union's purpose was to unionize the factory. Our case reflects the attempts of the union to unionize the plaintiffs' dairy as well as other non-union dairies. The purpose is purely local. The results upon interstate commerce are incidental to this local goal.

Second, the reasoning of the majority in the *Apex* case is that the Sherman Act prohibited only unreasonable restraints by labor unions; that Sections 6 and 20 of the Clayton Act insulated "reasonable" union activities from decapitation by the Sherman Act. In our case, unionization of the nonunion dairies was *not* unreasonable under the Sherman Act. Can it be denied that unionization is a proper union activity or a legitimate union goal? Can it be doubted that the presence of nonunion dairies, with their lower wage scale, their longer hours of labor, their failure to provide workmen's compensation benefits, seniority privileges, vacation rights and numerous other privileges demanded and obtained by its standard contract with union dairies, is a threat to the continued existence of union conditions? If the nonunion dairy is able to maintain these less desirable working conditions, it is only a matter of time before the unionized dairy will come to the union and demand the same privileges for itself.

Until recent years unions were struggling for existence as acceptable organizations in the social structure of our county. Their growth as organizations was purely a dynamic process. Unions, by their very nature must continue to grow or else die. If unions are static the dynamic economic environment will lead to certain obliteration. This was recognized by Mr. Chief Justice Taft in the *American Tri City* case in 257 U. S. at 209. This recognition was a reversal of the position that he took in the case of *Toledo A. A. & M. Rlwy.* v. *Pennsylvania Co.*, 54 F. 730, decided in 1894, where sitting as a district judge he held in substance that members of one railway belonging to a union were not justified in refusing to work upon "hot goods" originally carried by a nonunion railway carrier. This change in position was due to the fact

that Chief Justice Taft's economic and social beliefs had changed—and broadened—with the passage of time.

In the metropolitan City of Chicago, defendant union organized in 1902, has bettered the working conditions of its members, and has improved the status of the milk wagon driver generally throughout the milk industry. Even those individuals who work for the plaintiff dairy and employees similarly situated have profited by the struggles of the defendant union. To permit these individuals to assist in the destruction of the benefits gratuitously conferred upon them would be tragic irony.

The opinion in the *Apex* case is founded upon economic realities. It recognizes that working men may combine for the purpose of increasing their wage rate. It recognizes that the incidental effects of an increase in wages may sometimes be an increase in the price level or an injurious effect upon certain employers. But economic competition is a part of the democratic process. Care must be taken that neither side of combatants achieve disproportionate advantage as a result of judicial remedies created by virtue of personal economic convictions. Desire for equalization of economic competition led the Federal Congress to enact Sections 6 and 20 of the Clayton Act, the Norris-La Guardia Act, National Labor Relations Act, Railway Labor Act, and many other federal statutes.

Statutes restricting "government by injunction" by federal courts express definite public policy. Section 2 of the Norris-La Guardia Act in its statement of public policy approves of the action of associations of workers "in self-organization or in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection.*" (Italics ours.) What is the "other mutual aid or protection" so designated by the Act? In

the case at bar the members of the labor union for mutual aid and protection were interested in unionizing the plaintiff dairy.

A recent decision that graphically illustrates economic and social realities from the point of view of conflicting theories is *Schwartz* v. *Laundry Drivers Union*, Penn. Supreme Court; ¶ 60,045; Commerce Clearing House Labor Law Service, decided June 28, 1940 at pp. 60,093-60,103.

The decision of the majority with regard to the validity of a provision that the laundries would not accept work from any "bob-tail" who is not a union member (p. 60,090) supports our contention. Even the analysis and reasoning of the dissenting judge, in our opinion, represents the fundamentally sound economic and social realities that led to the enactment of the Norris-La Guardia Act. These realities are inherent in the economic struggle in the case at bar. We respectfully refer to such dissenting opinion for its analysis and its citation of authorities.

Plaintiffs' statement that the record shows actual interference with delivery trucks which were "instrumentality of and were in interstate shipment" is in error because on conflicting evidence the Master *rejected* plaintiffs' version. The Circuit Court of Appeals did not refer to *such* interference as being undisputed, but was referring rather to picketing activities in and about the stores.

The rule of the minority in the *Apex* case defines a standard of permissible activity to labor unions to the effect that they have "* * * right to quit work, right peaceably to persuade others to quit work, the right to proceed by lawful measures within the contemplation of the Clayton Act to attain the legitimate objects of labor organizations." 84 Lawyers' Ed. at 941.

Is the unionization of a nonunion dairy a legitimate object of a labor organization? Is a closed-shop contract

for a nonunion dairy a legitimate object of labor organization? Is a closed-shop contract for the entire industry a legitimate object for a labor organization? The answer to all these questions is "yes." Even under the rule formulated by the Chief Justice, we submit there was no restraint of commerce constituting a violation of the Sherman Act.

Plaintiffs' argument ignores the public policy of the (Wagner) National Labor Relations Act. Section 8 (3) provides that nothing in that statute or in any other statute of the United States shall preclude an employer from signing a closed shop agreement. Did not Congress by this section intend to avoid any application by a Court of Anti-Trust Laws for the purpose of carrying out this goal? (July 5, 1935, c. 372, Sect. 8 (3); 48 Stat. 453; 29 U. S. C. A. Sect. 159 (3).)

To declare that the unionization of non-union dairies in the City of Chicago is a violation of the Anti-Trust Law is to disregard the provisions and the purpose of the Wagner Act.

Plaintiffs' argument at pp. 20-24, would result in the conclusion that even a strike by the machine operators in the plaintiffs' dairy would constitute a violation of the Anti-Trust laws. To answer, we rely upon the cases cited in our petition at pages 39 and 41, and on the decision in the *Apex* case, both the majority and the minority, as supporting our contention that the particular interference in the case at bar concerning the sale of milk in Chicago did not constitute a violation of the Sherman Act. Our case is even more removed from the effect upon interstate commerce than a strike in the processing or bottling factories. *A fortiori,* the decision should be that our case does not constitute a violation of the Sherman Anti-Trust Act.

Apex Case.

Under the majority opinion in the *Apex* case, we contend that the facts in the case at bar show that the picketing of the Chicago stores did not substantially restrict the interstate transportation of milk.

There is no direct evidence showing decrease of the flow of milk in interstate commerce as a result of the picketing of the stores.

Under the law, the plaintiff had the burden of affirmatively showing by the evidence that there was a substantial effect upon interstate commerce. The testimony of the officers of the Lake View Cooperative shows that there was no decrease in the amount of milk it shipped to the plaintiff dairy. Courts will not speculate in finding jurisdiction of the Federal District Court on the ground of interference with commerce.

The fact is that if the stores serviced by the plaintiff dairy did not sell the milk to the public in Chicago *other* stores did.

Second, under the majority opinion, the facts in the case at bar disclose that the union did not intend to prevent shipment of milk in interstate commerce.

In the *Apex* case both of the foregoing issues were decided against the union and in favor of the employer. The dissent held that these two issues of fact required application of the Sherman Act, *implying* that if these facts did not exist the Sherman Act would not, of course, apply.

The precise problem for determination in the case at bar is whether or not a plan (sometimes described as a conspiracy), of union members in the City of Chicago to unionize a nonunion dairy or to unionize all nonunion

dairies for the purpose of protecting the wage scale, hours of labor and other working conditions in the unionized dairies, and the carrying out of such plan by posting individuals carrying banners (usually described as pickets), in front of stores vending products of the nonunion dairy to the public, where the record does not show that this resulted in the preventing of substantial shipments interstate by the nonunion dairy, is a violation of the Anti-Trust law.

Considering the legislative history of the Sherman Act and the social and economic background of the statute, it is clear why the rule of reason formerly well recognized by this Court as governing the conduct of employer combinations is *now* applicable to labor unions; that in order for the Sherman Act to apply some form of restraint of commercial competition "restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition."

Was the restraint upon competition in the case at bar within the condemnation of the *Apex* case? The majority opinion recognizes that the inherent realities of the situation warrant careful analysis and determination of the result of the infringement of labor union activities upon market competition. The Court reasons:

First, combinations of employees necessarily restrain competition among themselves in the sale of their services.

Second, even though this combination raises the market price of labor there still is no violation of the Sherman Act. This economic reality was recognized at the time

of the adoption of the Sherman Act, because according to the common law at that time such a combination which raises the market price of labor was not either a restraint of trade, as the term was understood at common law, or else it was not an unreasonable restraint of trade. (Footnote 23 cites the authorities pointing out among other things that in America, courts have *progressively* recognized the *expanding* legitimate scope of labor combinations.)

Next, this Court gives regard to the immunities conferred by Sections 6 and 20 of the Clayton Act.

Fourth, assuming that, or recognizing the economic reality that combinations that raise the wages of labor may raise the market price of the product, does the raise in price due to labor union activity constitute a violation of the Sherman Act? The Court said:

> "* * * Successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from nonunion-made goods, see *American Steel Foundries* v. *Tri City Central Trades Council,* 257 U. S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. (Citing cases.)"

This is judicial recognition of economic axioms. Legislative recognition of the legitimacy of unions and activities on behalf of their members is an empty shell unless it is followed by judicial acceptance of the "flesh and blood" materialization of the legislative standards. Law is not rhetorical emptiness.

If under the operations of economic laws, an increase

in wages is reflected in part by increase in price to the consumer, choice must be made between conflicting social desirabilities. This choice *has* been made by the Federal Congress. After years of experience, much of it bitter in its effect upon the working man, years of committee study, months of congressional debate, it has chosen to treat the increase in price as "reasonable."

Second, insofar as our *federal* government is concerned our society is sounder and happier under a high standard of living for the working man, notwithstanding the fact that the price to the consumer may be raised in proportion to the increase in wages. The sweat shop experience of workers was eliminated only by working men's cooperation through the garment workers' unions. Perhaps the consumer pays a few cents more for a dress or a suit, but our society is a better place in which to live as a result of the union growth and protection of its members.

Neither this brief nor this forum is the place for economic debate. The economics of the milk industry in Chicago are up to the present not capable of statistical presentation. But the *plaintiffs* ask for an injunction. The burden is upon *them* to show statistically that their contentions are socially sound. Next, the forum for such presentation is the legislature, not the courts.

The Federal Congress in 1914, in 1932, in 1935, in 1937 and in many other instances has recognized that the resolution of conflicting economic forces may best be had by full and complete presentation in legislative committee rather than appeal to a particular judge or to a group of several judges for determination. The Federal Congress has gone further for it has stated that the public policy is in favor of union protection of its membership by organization and concerted activity. The Federal Congress has recognized that competition between employers,

by virtue of price cutting, may be socially unsound insofar as it results in wage cutting. Fair Trade acts indicate that the legislatures approve of fixing the price to the consumer where the social and economic conditions warrant such action. See *Old Dearborn Co.* v. *Seagram Co.*, 299 U. S. 183, at 190.

Mr. Justice Brandeis in his dissent in the *Duplex* case, 254 U. S. 243, at 279, and in the *Bedford Cut Stone* case, 274 U. S. 37, at 56, recognized that because of the social policies favoring concerted and mutual action by laborers for the protection of their wage scale, that there is social justification for depriving consumers of the supposed benefits of curtailment of price competition. The original N. I. R. A. dramatically emphasized Federal legislative belief that unrestricted competition might result in social evils. The Federal Legislature was balancing the conflicting interests and claims of all groups of society. It found that the net advantage lay with the imposition of some restraint upon untrammeled competition. The decision of this Court in invalidating such legislation does not purport to contradict such social policy.

Consider the decision of *Tigner* v. *Texas*, 84 Law. Ed. 756, at 758, decided May 6, 1940, where this Court overruled the *Connelly* case. If economic realities conflict with legal abstractions, the latter must surrender.

In the *Apex* case, the Court discusses the meaning and application of Sections 6 and 20 of the Clayton Act. From the opinion of the Court it is not certain whether or not the Court intended to approve the decisions in the *Duplex Press*, the *Bedford Stone* and the *Danbury Hatters* case. Even assuming these earlier labor cases are still law, we contend that the particular facts in those cases are different from the facts in the case at bar:

1. There is no national organization.

2. Differences exist in the union's objectives in each of these cases.

3. Differences exist in the union means.

If these cases are not factually distinguishable we urge that in its decision in the case at bar this Court should make clear that the principles in the *Danbury Hatters, Duplex Press,* and *Bedford Stone* cases are squarely overruled. The dissenting opinions of Mr. Justice Brandeis in the *Duplex Press,* in the *Bedford Stone* cases, viewed in the light of his powerful dissent in *Truax* v. *Corrigan,* 257 U. S. 312, at 354, cogently formulate the principles of economics and the social philosophy that have been adopted by the Federal Government in the legislation discussed by this Court in its notes to the *Apex* case. The economic history of the United States in the last decade, especially when viewed in the emergencies of the present day, give the support of experience to the conclusions of Mr. Justice Brandeis.

In *Ritter* v. *Milk & Ice Cream Drivers' Union,* 136 Ohio St. 582, 27 N. E. (2d) 406, the Ohio Supreme Court refused to review the decision of an intermediate Court of Appeals. The economic dispute in the milk industry in Cleveland, Ohio, was substantially similar to the experience of Chicago in the case at bar. In Cleveland the union even entered into a contract with the milk dealers providing for a closed shop; providing, among other things, that only union members could deliver milk for such dealers. The plaintiffs, described as "independent milk brokers," sought an equity decree to "nullify" such contract on the ground that the contract was an unlawful conspiracy to eliminate the plaintiffs from competition. The injunctive relief was denied. (Digest of opinion is reported in C. C. H. Labor Law Service (2nd Ed.), ¶18,525.) (This cause is now pending before this Court on petition for certiorari, No. 354, Oct. Term, 1940.)

Immunization Under Clayton Act.

Plaintiffs' answer at page 25 cites cases for the general proposition that the Clayton Act may not be used as a cloak of immunity for illegal activities.

We have already pointed out that plaintiff is confusing the word illegal activities with the contention upon which we rely, namely, that the only kind of illegal activities involved in the case at bar is the question whether there is illegality as a result of violation of the Sherman Act.

All cases cited by plaintiff were decided prior to the passage of the Norris-La Guardia Act in 1932. Congress in passing the Norris-La Guardia Act intended to prevent courts from holding "as was the Clayton Act to make no change in the law." 75 Cong. Rec. 4630 (Senator Blaine.) It was to obviate such decisions that the Norris-La Guardia Act was placed on our statute books.

In the case at bar we do not contend that the Norris-La Guardia Act prevents injunctions against fraud or violence. Insofar as violence is concerned in the case at bar, the Master found against the plaintiffs on the issue of violence. Even assuming the facts on violence were in plaintiffs' favor, the conditions precedent to the Norris-La Guardia Act with regard to submission to arbitration, with regard to application to police officers for assistance, with regard to the conditions precedent to Section 7 of the Norris-La Guardia Act—all these plaintiff has failed to satisfy.

In *Jones & Laughlin* v. *Nat. Labor Relations Board,* 301 U. S. 1, at 33, this Court recognizes the necessity of workers to organize for the mutual protection. In *Va. Railway Co.* v. *System Federation,* 300 U. S. 515, the Railway Labor Act which was passed after the Norris-La Guardia Act was held to supersede it in the narrow field in the cases arising thereunder. In *Senn* v. *Tile*

Layers Union, 301 U. S. 468, this Court was discussing the constitutional validity of the Wisconsin "Norris-La Guardia Act."

In the cases cited by plaintiffs at page 27, to the effect that injunctions were granted, we pointed out in our petition at pages 36-37 that the injunctions did *not* restrain the acts specifically described in Section 4 of the Norris-La Guardia Act. See 75 Cong. Rec. 4773, 4774.

SHERMAN ACT DOES NOT ABOLISH DISTINCTION BETWEEN STATE AND FEDERAL POWER.

With regard to the first two groups of cases cited by plaintiff at pages 20-21, none of these cases discussed the question of so-called interference with milk or similar product after it has been bottled and has been started on its way either to the store or to the home. Contrast such decisions with *Highland Farms* v. *Agnew*, 300 U. S. 608; *Hood* v. *Commonwealth*, 235 Mass. 572; 127 N. E. 497, at 498, 499.

In the *Highland Farms* case this Court upheld the validity of the Virginia milk law. Plaintiff dairy had several stores in Virginia where he sold bottled milk that was purchased in its bottled form from a dairy across the border in the District of Columbia. The Virginia statute was attacked on the ground that it had unconstitutionally attempted to regulate and burden interstate commerce. The Court held that insofar as the statute applied to milk sold in Virginia within the designated market area, it did not affect interstate commerce, *i.e.*, that the sale of milk by a dairy in Virginia where the milk had been purchased in bottled form outside the state was not a sale in interstate commerce. See 300 U. S., at 615-616.

Surely the Sherman Act was not designed to abolish

the distinction between federal power and state power. The line must be drawn at some place. After the milk was bottled and on its way for delivery it can well be said that the interstate nature of the transaction had ceased, and that interference thereafter was local in its aim and in its activity to such a degree that Congress never intended to carry the Sherman Act to apply to such local activities.

See *Schecter Corp.* v. *United States,* 295 U. S. 495, at 543; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, at 306-309.

In the *National Labor Relations Board* v. *Laughlin and Jones Steel Co.,* 301 U. S. 1, at 30, the Court stated that the distinction between national and local activities in commerce is vital to the maintenance of the federal system. Even admitting that we are not facing a problem of power but a problem of statutory construction, the vital distinction between federal and state power must not be disregarded.

The Congressional debates on the Norris-La Guardia Act indicated that it was recognized and accepted that successful peaceful strikes would interfere with interstate commerce.

75 Cong. Rec. 4693 (Senator Walsh).

The facts in our case fall within the language of this Court in the second *Coronado* case, 268 U. S. 295, where at page 310 the Court states that the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily a remote and indirect obstruction to that commerce. See the discussion by this Court in the *Apex* case opinion of the decisions in the first *Coronado* case, namely, *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, at 412, 407, 408; *United Leather Workers* v. *Herkert Co.,* 265 U. S. 457 (adopting

the dissenting opinion of Judge Stone, warning against making of strikes subject to the federal power under the Sherman Act, 284 F. 464, 465) and *Levering Co.* v. *Morrin,* 289 U. S. 103, at 107; and *Industrial Assn.* v. *United States,* 268 U. S. 64.

Additional opinions of the lower courts that confirm this analysis:

Blankinship v. *Kurfman,* 96 F. (2) 450, at 455, 466 (C. C. A. 7).

Danville Local Union v. *Danville Brick Co.,* 283 F. 909, at 910 (C. C. A. 7).

Gable v. *Vonnegnt Machine Co.,* 274 F. 66 (C. C. A. 6).

Foss v. *Portland Terminal,* 287 F. 283 (C. C. A. 1).

Great Northern Railway v. *Local Union, Great Falls,* 283 F. 557, (D. C. Montana).

United Mine Workers v. *Pa. Co.,* 300 F. 965 (C. C. A. 8).

Abouf v. *Spreckles Co.,* 26 F. Sup. 830 (D. C. Cal.).

Arthur & Son v. *Kraft Cheese Co.,* 26 F. Sup. 824 (Dist. Ct. Md.).

The order of the Secretary of Agriculture concerns the price of milk to be paid to the producers. It does not purport to deal with milk after it is bottled.

The decision of this Court in *United States* v. *Borden Co., et al.,* does not purport to pass upon the contentions we advance in the case at bar.

All of the cases cited by the plaintiff on pages 22 to 24 must be considered in light of our analysis of the decision of this Court in the *Apex Hosiery* case. With regard to labor unions, the fact is that the union in its attempt to achieve legitimate union objects is brought into conflict or in opposition to the employers' conduct

of his business. This is inevitable. The opposition may consist of various kinds. Federal cases supporting the right of the union to "oppose" the employer are as follows:

Rambusch v. *Brotherhood of Painters,* 105 Fed. (2d) 134 (cert. denied by Supreme Ct.).

Barker Painting Co. v. *Brotherhood of Painters,* 23 Fed. (2d) 743, 745.

The decisions of state courts illustrating the right of the union to oppose such working conditions as are detrimental to the rights of the union members and union employees are as follows:

Kemp v. *Division,* 255 Ill. 213.

Lichterman v. *Laundry Drivers Union,* 204 Minn. 75, 282 N. W. 689, at 690.

Sheehan v. *Levy,* 238 S. W. 900.

Weber v. *Musician's Union,* 17 N. Y. S. (2d) 144. (Note in 53 Harv. L. Rev. 1054).

Schwartz v. *Laundry Drivers Union,* C. C. H. Labor Law, ¶60,045.

Landis "Cases on Labor Law," page 357, note.

Unionization of An Industry Is Not a Monopoly Within Meaning of Section 3 of the Sherman Act.

To unionize all milk wagon drivers is not to control trade or commerce within the meaning of the Sherman Anti-Trust Act. Labor is not a commodity. Unionization of all laborers, *i.e.,* the grouping together of all of the services offered by working men is not restraint of any commodity. The unionization of all the workers in the entire coal industry would not constitute a monopoly of trade or commerce within the meaning of Section 3 of the Sherman Act. The decision of the Circuit Court of Appeals to the effect that unionization of all milk wagon drivers in Chicago would constitute a violation of the

monopoly provisions of the Sherman Act is the *first* decision by a federal court to that effect since the decision by the trial court in the case of *Hitchman Coal Co.* v. *Mitchell,* 202 F. 512, at 554. The Circuit Court of Appeals reversed this holding placing its decision on another ground, and this Court affirming the Circuit Court of Appeals in 245 U. S. 229, 253, did not refer to the holding of the trial court as the basis of its decision.

The decision of the C. C. A. is contrary to the language of this Court in *American Foundries* v. *Tri City Council,* 257 U. S. 184 at 209. It is contrary to its earlier decision in *Gasaway* v. *Borderland Coal Co.,* 278 F. 56, at 65; discussed in 35 Harvard Law Rev. at 459. It is contrary to *Nat'l Assoc. of Mnfgrs.* v. *U. S.,* 263 U. S. 403.

The substantive law of Illinois recognizes the validity of the closed shop in "one industry."

Kemp v. *Division,* 241, 255 Ill. 213, at 225 (adopting the dissenting opinion of Justice Julian Mack, reported in 153 Ill. App. at 637, 656).

Carpenters Union v. *Citizens Committee,* 244 Ill. App. 540, at 555, 616, 617 (Reversed in 333 Ill. 225).

People v. *Seefeldt,* 310 Ill. 441, at 445.

Christenson v. *Kellog Switchboard,* 110 Ill. App. 71.

The Federal Government could not enforce one kind of Anti-Trust law in one place and another kind elsewhere.

The Federal Government has stated the Federal policy in Norris-La Guardia and Clayton Acts.

The alternative to following a unified Federal policy is to accept diverse local views as to what constitutes unreasonableness in violation of the Sherman Act.

So a Federal Court sitting in New Jersey would be required to hold that a strike to unionize the entire oyster

industry is a restraint of trade in violation of the Sherman Act, and could be indicted, or under its argument the Norris-La Guardia Act would not apply. Whereas a New York Federal Court passing on the same set of facts would hold no violation of the Sherman Act and no jurisdiction to grant injunction by virtue of application of the Norris-La Guardia Act. cf. the decisions of courts holding that non-labor restraints or monopolies are *not* violations of the Sherman Act. *Millinery Creators Guild* v. *Fed. Trade Comm.*, 109 Fed. (2d) 175 (pending on certiorari application docket No. 251, Oct. Term, 1940); *McCann* v. *N. Y. Stock Exchange,* 107 Fed. (2d), 908, as discussed in 40 Colum. L. Rev. 736 (April, 1940).

We take issue with plaintiffs' statement at page 23 that the entire controversy is over the attempts of the defendants to prevent the sale of cut-rate milk. This statement is a repetition of the now familiar error so frequently found in labor cases, of misunderstanding union purposes and confusing economic results with union goals. As the facts indicate, practically all union dairies sell cut-rate milk, at least to some degree; also even nonunion dairies, such as the plaintiff, sell *some* milk at the same price as union dairies. The controversy is between the union and the nonunion working conditions. The *reason* for the controversy is the difference in wage scale, hours of labor, and other working conditions between the union and nonunion dairies. Even if, as a matter of economics, a price differential exists between nonunion and union dairies as a result of the difference in the wage scale, the union is nevertheless justified in attempting to protect its union scale. Sweat-shop conditions in the clothing industry might cause a reduction in price. Would the Garment Workers Union be prohibited by the Sherman Act from attempting to unionize such industry simply because the elimination of sweat shops would result

in price increase? According to plaintiffs' argument such conduct would be a violation of the Anti-Trust law.

SECONDARY BOYCOTT IS NOT VIOLATION OF SHERMAN ACT.

At pages 23-24, plaintiffs apparently assume that a secondary boycott constitutes a violation of the Sherman Act.

This contention is irrelevant because the decision of this Court in the *Apex* case is that the so-called illegality of "means" used is irrelevant in determining whether or not there has been a restraint of trade within the meaning of the Sherman Act.

One of the questions involved in this cause, and more especially in the cause now pending in this docket entitled *Milk Wagon Drivers Union* v. *Meadowmoor Dairy,* No. 1, Oct. Term, 1940, is whether or not a state court by judicial decision may validly prevent the exercise of constitutional rights to peaceful picketing by designating such conduct as a "secondary boycott." This will be discussed further in our brief.

In our petition, pages 37-38, we urge that under the Norris-La Guardia Act the specific discretions of Section 4 rendered a federal court powerless to issue an injunction against activity, regardless of whether it was a primary or secondary boycott. Where there is a "labor dispute" within the meaning of the Norris-La Guardia Act there is no "unreasonable" restraint of trade by the union within the meaning of the Sherman Act.

cf. 40 Colum. L. Rev. at 29, 51.

U. S. v. *Hutcheson,* C. C. H. Labor Law Service (2d ed.), ¶18,601. Pending on appeal, No. 43, Oct. Term, 1940.

EXISTENCE OF LABOR DISPUTE WITHIN MEANING OF NORRIS-LA GUARDIA ACT.

In our petition, pp. 25-38, we cited and discussed decisions of this Court that reflected the purpose of the Norris-La Guardia Act and the application of its provisions. As a matter of precedent they require a reversal of the decision by the Circuit Court of Appeals. That decision is exactly the kind of rulings that Congress wanted to avoid. The committee reports, cited in the New Negro Alliance decision indicate a definite intent to avoid the use of federal court injunctions to solve the intricate problems of economic competition between employees and employers.

The decision of the Circuit Court of Appeals, if sustained, will encourage the lower Federal courts to engage in the legal thaumaturgy which in 1922 accounted for approximately 300 injunctions in "Railroad strike cases". We respectfully urge that the Congressional debates on the Norris-La Guardia Act justify defendants in urging this court to realize the consequences of putting the Federal courts back in the "business of governing by injunction."

75 Cong. Rec. 4618-4626 (Senator Blaine).
75 Cong. Rec. 4502 *et seq.* (Senator Norris).
75 Cong. Rec. 4914-4920 (Senator Wagner).

Milk Wagon Drivers in the City of Chicago owe their improvement in working conditions to their organization into a union and ensuing concerted activity. Non-union dairies are in economic competition with the members of the union. The economic interests of both groups are substantial but under the Norris-La Guardia Act the Federal courts are precluded from determining the issues in favor of the non-union dairies by means of an injunction.

Non-union employers seeking a Federal public policy differing from the presently existing one must go to the Federal Congress.

III.

Replying to Plaintiffs' III.

FREEDOM OF SPEECH.

Plaintiffs' answer under this heading in substance relies upon the general formula that a court of equity can enjoin "freedom of speech" when the *purpose* of the speech is illegal.

This vague formula is rhetorically simple, but is socially dangerous. If applied logically every legislature and every court might avoid the constitutional restraint by the creation of an "illegal purpose" for the speech.

Our case presents the problem whether a *federal* equity court has the power to restrain publicity. The federal statutes creating federal equity courts should not be so construed as to indirectly avoid constitutional prohibitions which could not be directly avoided.

Again, the problem does not necessarily involve the question whether or not a purpose is tortious, for it is entirely possible that the purpose may be tortious and therefore *subsequently* punishable by either criminal proceedings for violation of legislative prohibition or by civil actions for damages for wrong, *i. e.,* tortious conduct, and still not determine the question whether an equity court can by injunction restrain *future activity.* An injunction is a *previous* restraint upon freedom of speech—to be contrasted with a subsequent suit either at criminal law or at law for damages. The cases of this Court and the text writers clearly recognize this broad distinction.

It is to be noted that in the case of *Aikens* v. *Wisconsin,* this Court said that the *plot* was to be punished by

law—not the separately innocent constitutionally protected act. Again, the Court was discussing punishment by criminal law.

Congress wanted to avoid the use of Justice Holmes' formula as a basis for the issuance of an injunction to restrain the acts specified by Sect. 4 of the Morris-La Guardia Act, 75 Cong. Rec. 4772 (Senator Herbert).

The *Gompers* case has been previously discussed.

Near v. *Minnesota,* 283 U. S. 697, supports our differentiation between previous restraint by injunction and subsequent punishment either by criminal law or civil action for damages.

Duplex Press case has already been discussed.

In reply to the remaining argument of plaintiffs, we adopt the provisions of our petition, pages 46-50, and in addition cite the following authorities which analyze and discuss the problem of freedom of speech:

1. Earlier Illinois "labor controversy" cases concerning the substantive law of Illinois:

Vulcan Detinning Co. v. *St. Clair,* 315 Ill. 40, at 46-47.

Schuster v. *International Assn. of Machinists,* 293 Ill. App. 177, at 193.

Lietzman v. *Broadcasting Station W. C. F. L.,* 282 Ill. App. 214, at 218.

Beaton v. *Tarrant,* 102 Ill. App. 124, at 129.

"Labor controversy" cases of other state courts that corroborate our analysis and conclusion as to the rights of freedom of speech are as follows:

Ex parte Lyons, 94 Cal. App. 70; 81 Pac. (2nd) 190, at 192, 193.

People v. *Harris,* 104 Colo. 386; 91 Pac. 2nd) 989, at 993.

Kraemer v. *American Federation of Hosiery Workers,* 305 Pa. 206; 157 Atl. 588, at 590, 602.

People v. *Armentrout*, 118 Cal. App. 761; 1 Pac. (2nd) 556, at 560 (dissenting opinion of Yankewich, J.).

Crosby v. *Rath*, 136 Ohio St. 352; 25 N. E. (2nd) (the dissenting opinion of Zimmerman, J., at p. 935; pending on application for certiorari, Oct. Term 1940, No. 187).

Denver Truck Lines v. *Perry*, 101 Pac. (2nd) 436, at 444 (Colo.).

Reno v. *Second Judicial Dist.*, 95 Pac. (2nd) 994, 998 (Nev.).

The principle of freedom of speech involved is most clearly presented by those cases involving disputes between groups of individuals *other* than employer-employee groups. In those cases it is held that the dispute may be publicized by a banner or placard displayed to the public as an exercise of the parties' constitutional rights to freedom of speech under the federal constitution and the amendments thereto.

Julie Baking Co. v. *Graymond*, 152 Misc. 946; 247 N. Y. S. 250, at 251-252 (1934).

Rosman v. *United Kosher Butchers*, 163 Misc. 331; 298 N. Y. S. 343-344 (1937).

Bernstein v. *Retail Cleaners*, 31 Ohio M. P. (N. S.) 433, at 436 (1934).

Individual Store Owners v. *Penn Treaty Stores*, 33 Pa. D. & C. 100, at 101 (1938).

There is a respectable body of authority holding that a court of equity is precluded by the constitutional guarantee of freedom of speech against granting injunctive relief against publications or utterances in furtherance of a strike or boycott.

Truax v. *Bisbee Local*, 19 Ariz. 379; 171 Pac. 121 (1918).

Marx & H. Jeans Clothing Co. v. *Watson*, 168 Mo. 133; 56 L. R. A. 951; 90 Am. St. Rep. 440; 67 S. W. 391 (1902).

Re Heffron, 179 Mo. App. 639; 162 S. W. 652 (1914).

Lindsay & Co. v. *Montana Federation of Labor*, 37 Mont. 264; 18 L. R. A. (N. S.) 707; 127 Am. St. Rep. 722; 96 Pac. 127 (1908).

Richter Bros. v. *Journeymen Tailors' Union*, 24 Ohio L. J. 189; 11 Ohio Dec. Reprint 45.

Riggs v. *Cincinnati Waiters' Alliance*, 5 Ohio N. P. 386; 8 Ohio S. & C. P. Dec. 565 (1895).

Ex parte Tucker, 110 Tex. 335; 220 S. W. 75 (1920).

Defendants do not contend that the right to freedom of speech includes the right to commit acts of violence. We do contend that plaintiffs who seek an injunction against freedom of speech cannot defeat the constitutional rights to such freedom of speech by pointing to the existence of violence because the court of equity separates the lawful acts from the unlawful acts. (See cases *supra* at p. 19.)

The rules adopted by the American Law Institute in the "Restatement of the Law as to Torts" and the comments in support of such rules adopt the point of view of these authorities and reject the decisions to the contrary.

See Sec. 779 and comments, especially at pages 109-110, and Sec. 79 and comments at pages 143 to 148, inclusive.

The recent decisions of this court in the *Thornhill* and the *Carlson* cases make it clear that any ordinance or statute so worded as to make it criminal for a labor union to picket in the case at bar would be invalid under the free speech guarantees under the federal constitution. The analysis and reasoning of this Court, although stated with regard to legislative enactment, apply with equal force to the injunction decree granted by a court of equity in a particular proceeding.

See the discussion of these cases in 8 Interna-

tional Juridical Assn., pages 113, 120-124 (May 1940) and the numerous authorities cited in the notes.

The essence of these decisions is that our federal constitution guarantees the right of free men to learn facts in the market place, to discuss them with other free men, and to come to their own conclusions. *This* is the essence of freedom of speech. This is the essence of the traditional publicity mechanism of trade unions, namely, peaceful picketing. To permit an equity court to restrain the carrying of banners is to necessarily permit the equity court to restrain the distribution of handbills or the printing of or advertising in newspapers. Neither social nor industrial democracy can exist where expression of thought and discussion between individuals is stifled by injunction. Our American social philosophy exudes the premise of appeal to reason by free men.

cf. *Cantwell* v. *Conn.*, 84 Law Ed. 836, at 842, 843.

What arguments can the employer give to support any contention that the public should be "prevented" from knowing the opinion and statement of the defendant union and its members?

The storekeepers in the case at bar employed *their* method of publicity in advising the public *their* version of the controversy by inserting the C. I. O. union cards in their windows. Defendants do not deny that they have this privilege. The defendants simply ask for the privilege of carrying the banner outside the store advising the public of their version.

The injunction ordered by the Circuit Court of Appeals attempts to preserve certain economic conditions. But this Court recently stated:

"Equally obvious is it that a state may not unduly suppress free communication of views, religious or

otherwise, under the guise of conserving desirable conditions."

Cantwell v. *Connecticut*, 84 Law Ed. at 842.

Plaintiffs seek an injunction for the purpose of permanently perpetuating an advantageous economic condition. (*Senn* v. *Tile Layers' Union*, 301 U. S. 468, at 480-482.)

cf. Pepper, 75 Cong. Rec. 4694.

Defendants seek to have an opportunity to present their version of the economic scene to the public—so that the public by making *its* choice will govern the result.

Secondary Boycott v. Freedom of Speech.

To rely upon the phrase "secondary boycott" is to avoid a clear-cut analysis of the issues. If carrying a banner and appealing to the public is in fact the giving of publicity, then the phrase "secondary boycott" loses its magic efficacy as a formula for arbitrarily determining enjoinability or nonenjoinability. If, as the fact is, the determination whether to purchase union or non-union milk rests with the public by its choice after being advised by either one or both sides of the parties to the dispute, then the use of the phrase secondary boycott is misleading.

Courts, in declaring a secondary boycott to be illegal, assumed that coercion existed in fact; that such coercion was socially undesirable, and therefore tortious according to law. Carrying a banner is not coercive. The housewife or any other person seeking to do business with a storekeeper has the power and privilege of choice. The storekeeper has no constitutional guarantee to either retaining his previous customers or obtaining his new customers any more than the union has the constitutional guarantee of preventing the storekeeper from gaining new

customers or retaining old customers. Both sides have the constitutional privilege of appealing to the public for its support. The decision of the public should not be compelled either one way or the other by an injunction dictated upon a formula created for the purpose of preserving specified economic and social views. The competition of the market place suffices to test the publication choice. It is time that the phrase "secondary boycott" be dropped and recognition be given to the privilege of both groups, employer and employee, to appeal to the public and ask the latter to determine the correctness or wisdom of the conflicting points of view.

Denver Local Union of Teamsters v. *Perry Truck Lines,* 101 Pac. (2d) 436 (Colo.) at p. 444 and cases there cited.

"Labor and the Secondary Boycott", 15 U. of Wash. L. R. 137 (July, 1940) and various articles cited in Note 3, p. 137.

Goldfinger v. *Feintuch,* 276 N. Y. 281; 11 N. E. (2d) 810.

Iron Molders Union v. *Chalmers,* 166 Fed. 45.

Kroger Grocers v. *Ketail Clerks Union,* 254 Fed. 890, at 897.

United Chain v. *Philadelphia Union,* 50 Fed. (2d) 189, at 191.

CONCLUSION.

Unionization of non-union dairies in Chicago is not a violation of the Anti-Trust Laws. The Morris-La Guardia Act precluded the Federal Court from issuing an injunction to prevent the defendant union and its members from carrying out its legitimate purpose. The carrying of banners is an exercise by members of defendant union of their rights to free speech under the 14th Amendment to the Federal Constitution.

Petitioners respectfully submit that the judgment of the Circuit Court of Appeals for the 7th Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 20

MILK WAGON DRIVER'S UNION, LOCAL 753, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, A VOLUNTARY ASSOCIATION; ROBERT G. FITCHIE, JAMES KENNEDY, STEVE SUMNER, FRED C. DAHMS, F. RAY BRYANT, ALVIN F. RICHARDS, AND JOSEPH L. PATTERSON,

Petitioners,

vs.

LAKE VALLEY FARM PRODUCTS, INC., A CORPORATION; AMALGAMATED DAIRY WORKERS, LOCAL INDUSTRIAL UNION NO. 819, A VOLUNTARY UNINCORPORATED ASSOCIATION; LAKE VIEW CO-OPERATIVE OF WATERTOWN, WISCONSIN, AN AGRICULTURAL COOPERATIVE CORPORATION OF THE STATE OF WISCONSIN,

Respondents.

REPLY BRIEF OF PETITIONERS.

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REPLY BRIEF OF PETITIONERS.

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

In this reply brief, defendants (petitioners) follow the outline of plaintiffs' (respondents') brief.

Most of the arguments advanced in plaintiffs' brief have been already answered in defendants' original petition for

certiorari and their subsequent brief in support thereof. However we briefly refer to two aspects of plaintiffs' brief:

First, to the arguments scattered throughout plaintiffs' brief that they are entitled to an injunction on the alleged economic premise that their method of milk delivery is more progressive and more efficient than that used by the union dairies in Chicago.

In answer we say, (1) the premise is unsound; (2) the plaintiffs' deductions from such unsound premise are fallacious.

Second, to the arguments in plaintiffs' brief based upon alleged facts in the record.

The authorities recognize that the drama of an industrial conflict is not fully disclosed by the black and white of a printed record. Economic and social forces, facts and impulses vie with the complicated psychological factors in bringing the entire scene of an industrial conflict before a Court. Our "economic" summary at pp. 2-4 of our petition is an attempt to bring before this Court the conditions in the milk industry in the City of Chicago, Illinois. This economic picture is not only shown by the dispute in the case at bar but is emphasized by the records in other cases involving the Chicago milk industry cited at p. 7 of our brief. Plaintiffs do *not* discuss these broad economic features but instead attempt to limit themselves to a *portion* of the record in the case at bar, namely to the 9th finding of the District Court (R. 249). Under this finding plaintiffs apparently broaden the controversy to so-called cut-rate dairies on the one hand and union dairies on the other.

Also, plaintiffs' statement of fact concerning the "broadened controversy" (pp. 2-5) ignores the Record in the following aspects:

(1) It ignores the fact that so-called Chicago cut-rate

dairies engage the services of vendors for delivery of their milk to the household, *i. e.,* retail delivery as well as delivery to the stores (R. 77, 90, 92, 93, 94, 105, 120). Some of the cut-rate dairies *employ* drivers who are paid less than the union scale (R. 77, 87).

(2) It ignores the fact that practically all union dairies sell milk at the so-called cut-rate price (R. 282, 317, 318, 344). It ignores the fact that the so-called cut-rate dairies' prices to the public vary from store to store (R. 71), and that there is no uniform price for cut-rate milk.

(3) It ignores the fact that union dairies deliver milk to stores too, *i. e.,* have wholesale routes (R. 60, 61, 63, 68, etc.).

(4) It ignores the fact that the vendors employ helpers whose wages are much lower than those of the union scale (R. 68, 73, 82, 90).

(5) It ignores the fact that the union has referred to the plaintiff dairy as non-union. (See Exhibit set out in plaintiff's complaint (R. 41).)

(6) It ignores the fact recognized by the Circuit Court of Appeals that the defendant union attempted to unionize vendors (R. 368).

(7) It ignores the evidence concerning the "problematical" plaintiff labor union as described by the Master (R. 220, No. 38).

(8) It ignores the fact that the general finding of the District Court on the equities in favor of the defendants and against the plaintiffs at R. 250-251 settled all controverted issues of fact in favor of the defendants and against plaintiffs.

(9) It ignores the fact that the findings of violence with the exception of the finding of violence connected